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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 572

HENRY GRADY SNEAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 15-25) is reported at 217 F. 2d 912. The opinion of the District Court appears at pages 53-57 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1954 (Pet. App. 15). The petition for a writ of certiorari was filed on February 2, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence of petitioner's intent to violate the internal revenue laws to subject his property to seizure and forfeiture under 26 U. S. C. 3116.

2. Whether the court below properly held that the admission of testimony as to petitioner's general reputation was "harmless error" in the light of other evidence adduced.

3. Whether there was error in decreeing a forfeiture under 26 U. S. C. 3116 after a criminal warrant charging petitioner with a violation of 26 U. S. C. §§ 3115, 3116 had been dismissed before a United States Commissioner.

STATUTE INVOLVED

26 U. S. C. 3116 (1952 ed.) provides:

§ 3116. Forfeitures and seizures

It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of the act of June 15, 1917, 40 Stat. 228, for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. The seizure and

forfeiture of any liquor or property under the provisions of this part, and the disposition of such liquor or property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal-revenue laws. (53 Stat. 362.)

STATEMENT

A libel of information filed by the United States in the Western District of Virginia prayed for the forfeiture of a 1952 Ford truck, together with 140 bags of malt, under the provisions of 26 U. S. C. 3116 (R. 1-5). The answer filed by petitioner demanded a jury trial and challenged the right of the government to maintain forfeiture on the ground that a criminal warrant, charging petitioner with violation of 26 U. S. C. 3115 and 3116 on the basis of acts involving the same truck and malt, had previously been dismissed before a United States commissioner (R. 6-8).

At trial, the facts stipulated (R. 9-10) and adduced from government witnesses (R. 12-40) were as follows:

Petitioner and Ira Jackson Seay drove the truck in question from Henry County, Virginia, to Milwaukee, Wisconsin, where they purchased 400 pounds of compressed yeast in the name of Turner

Bakery, Canton, Ohio, and 140 100-lb. bags of fine ground malt in the name of Roy Scott. Agents of the Alcohol and Tobacco Tax Division followed the truck on its return trip, noting that the North Carolina license plates that it bore when leaving Milwaukee were changed, in Illinois, to Virginia plates (R. 10). The truck was later seized when it was observed parked (without license plates) among some abandoned cars behind petitioner's combined store and service station in Henry County, Virginia. Although the truck was registered in Virginia in the name of Dannie Shively, petitioner admitted ownership and the fact that he had been driving it. He denied that he had been out of the state of Virginia (R. 14, 21). He claimed that the malt was "cow-feed" which he had purchased "up the country", said he did not know from whom he had bought it, and denied knowledge of the yeast (R. 14, 21, 24).

Over objection at trial, testimony as to petitioner's reputation for dealing in illicit whiskey was admitted (R. 15, 22, 32). In addition, there was testimony that illicit whiskey had been found by officers in and around the service station while it was owned (though not operated) by petitioner to such extent that there was an injunction against keeping alcoholic beverages on the premises (R. 34). There was likewise testimony describing petitioner's store as a small two or three room apartment with "canned goods" and "corn flakes" (R. 33), and testimony indicating that barley malt was not used by two local feed manufacturers because of prohibitive cost (R. 35-40).

Petitioner did not take the stand or introduce any evidence. He was not present at the trial and his counsel asked for no continuance on account of his absence.

The jury found that petitioner intended to use the malt and yeast in violation of the internal revenue laws (R. 50). The District Court denied a motion to set aside the verdict (R. 53-57) and entered an order of forfeiture (R. 58-60).

The Court of Appeals affirmed (Pet. App. 25), the majority holding that, although the testimony as to petitioner's reputation was not competent, its admission was harmless error in the light of other testimony.

ARGUMENT

1. Petitioner's attack on the sufficiency of the evidence to support the forfeiture (Pet. 5-12) presents no question for review by this Court. All three judges of the court below agreed, in the words of the dissenting judge (Pet. 24), that "there was persuasive circumstantial evidence that the truck was used by Snead to transport the materials unlawfully." The evidence shows that petitioner, who operated a service station and a small retail store, motored approximately a thousand miles to buy, under assumed names, large quantities of malt and perishable yeast, materials which could have been more conveniently procured through ordinary channels and which would normally be used in his community only in connection with illicit distilling; that he used for such trip a truck registered in the name of another person; that he changed license tags en route and made false statements to

investigating officers. Petitioner made no attempt to explain these unusual facts. His silence, in this civil action, was a factor which the jury could properly consider. *Kent* v. *United States,* 157 F. 2d 1, certiorari denied, 329 U. S. 785; *Williams* v. *United States,* 199 F. 2d 921 (C. A. 5); *Stagner* v. *United States,* 197 F. 2d 992 (C. A. 5). His present claim to be a licensed merchant who purchased in the usual course of business legitimate articles of commerce is negatived by the totality of the evidence and his own failure to explain the reason for the purchase. There was thus ample basis for the jury's verdict.[1]

2. While all three members of the court below agreed that the admission of evidence as to petitioner's reputation as a violator of liquor laws was error, there was a division of opinion as to whether the error was harmless. We agree that there was error. The question as to whether particular error is harmful, involving as it does an element of speculation, is the type of question as to which reasonable men may reasonably differ, as the division in this Court in *Kotteakos* v. *United States,* 328 U. S. 750, illustrates. We submit with the majority that the evidence in this case, although circumstantial, was strong enough to warrant the application of Rule 61, Fed. Rules of Cir. Proc., in holding that

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[1] Decisions cited by petitioner (Pet. 6-12) are not in conflict with the holding here because, in determining the question of intent, they necessarily turn on the facts in each case. Rather, the cases generally tend to support the present decision. See *United States* v. *Ryan,* 284 U.S. 167, 176.

the error was not such as to affect substantial rights. See *Lutwak* v. *United States,* 344 U. S. 604, 619; *Horning* v. *District of Columbia,* 254 U. S. 135, 139; *Hilliard* v. *United States,* 121 F. 2d 992, 999 (C.A. 4), certiorari denied, 314 U. S. 627 (C. A. 4); *Dye* v. *United States,* 262 Fed. 6, 11 (C. A. 4); Wigmore on *Evidence,* 3d ed., vol. 1, pp. 364-395, 28 U. S. C. 2111.

Moreover, we think that there is no need for further review. The general rule of law, as to the inadmissibility of reputation evidence, has been clearly and authoritatively enunciated. As to the effect of the error, the decision below represents merely the application of correct principles, as enunciated by this Court, to the particular facts of this civil action. It may well be that a more cautious rule should prevail in a criminal case; as to this the Court is not called upon to decide on the present record. The issue here basically involves an exercise of judgment in a civil case, akin to discretion, by the appellate court, and there was here no such clear abuse as would require further review.

3. Petitioner contends that the rule of *Coffey* v. *United States,* 116 U. S. 436, would bar forfeiture proceedings against him because a criminal warrant involving the same property had previously been dismissed before a United States Commissioner. That case, applying the principle of *res adjudicata,* held that an acquittal bars a forfeiture involving the same facts. It has no application to a dismissal without trial.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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